APR 1 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 838

ARCH S. RHODES,

Petitioner,

vs.

THE FEDERAL LAND BANK OF ST. PAUL AND FEDERAL FARM MORTGAGE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM LEMKE,
Counsel for petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	2
The statute	2
Issues involved	3
Decisions below	4
Statement of facts	4
Jurisdiction	8
Reasons relied on for allowance of writ	8
Prayer for writ	9
Brief in support of petition	10
Section 75	10
Decision of the Circuit Court contradictory	11
The correct rule	14
Cases supporting petitioner	15
Respondents' petition insufficient	17
Conclusions of law biased	19
Conclusion	21

Table of Cases Cited.

Burnett v. *Central*, 125 Fed. 836	8, 15
Casoudounceq, In re, 46 Fed. Supp. 718	3, 18
Charles Stone Florsheim, In re, 24 Fed. Supp. 991	18
Dunsdon v. *Federal Land Bank of St. Paul*, 137 F. (2d) 84	8, 16
Equitable v. *Carmody*, 131 F. (2d) 318	8, 15
Federal Land Bank v. *Castanien*, 116 F. (2d) 588	16
Fordyce v. *Railway Companies*, 145 Fed. 544	3, 8, 18
Gustave Schafer Co., 163 F. (2d) 137	8
Humphrey's Gold Corporation v. *Lewis*, 90 F. (2d) 896	18
Hecht v. *Alfaro*, 10 F. (2d) 464	18
Kowalaky v. *American Employer's Ins. Co.*, 90 F. (2d) 476	3, 8, 17
Newman v. *Gresley*, 77 F. (2d) 252	15
Newman v. *Burnham*, 126 F. (2d) 336	15

Page

Pfister v. *Northern Illinois*, 317 U. S. 144, 63 Sup. Ct. 133, 87 L. Ed. 123 16
Rait v. *Federal Land Bank of St. Paul*, 135 F. (2d) 447 14
Rasmussen v. *Greslay*, 77 F. (2d) 252 ..... 3, 15
Samuelson v. *Central*, 125 F. (2d) 838 8
Schmidt v. *Beiseker*, 120 N. W. 35 7
Stitzer Hotel Company, In re, 29 F. (2d) 571 8
Virginia Railway Company v. *Chambers*, 46 F. (2d) 20 ..... 3, 18

STATUTES CITED.

Act of February 13, 1925, Sec. 8(a), 28 U. S. C. 350 8
Bankruptcy Act, Sec. 75, 11 U. S. C. 203 2
Bankruptcy Act, Sec. 75(s)(3), 11 U. S. C. 203( )(3) 8
General Orders in Bankruptcy 47 and 50 ..... 2, 12
Judicial Code, as amended (28 U. S. C. A. 347(a)) 8, 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 838

ARCH S. RHODES,

Petitioner,

vs.

THE FEDERAL LAND BANK OF ST. PAUL AND FEDERAL FARM MORTGAGE CORPORATION,

Respondents.

PETITION AND BRIEF.

For Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Harlan F. Stone, Chief Justice, and to the Associate Justices, of the Supreme Court of the United States:

Your petitioner, Arch S. Rhodes, respectfully petitions this Honorable Court for a writ of certiorari to review the decision and the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered in the above entitled cause on February 16, 1944, which decision

affirms the judgment of the United States District Court of North Dakota. This decision holds that the District Court may set aside the valuation of a farmer-debtor's real estate found by the supervising conciliation commissioner, who heard and saw the witnesses, and substitute its judgment for that of the commissioner under Section 75(s)(3). Paragraph (s)(3) provides for no review or appeal. The commissioner's findings are final unless clearly erroneous, fraudulent, or contrary to the evidence.

A Summary of the Matter Involved.

The Statute.

This case arises under Section 75 of the Bankruptcy Act, 11 U. S. C. 203, which relates to proceedings in connection with the rehabilitation of a farmer-debtor. The portion of the Statute involved is Section 75(s)(3) and General Orders 47 and 50 in bankruptcy. Section 75(s)(3) as far as here material reads:

> "(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less payments paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, *the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal*, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, *turn over full possession and title of said property, free and clear of encumbrances to the debtor:* * * *."

Issues Involved.

The questions here involved are:

1. Was the District Court justified in setting aside the valuation of a farmer-debtor's real estate as fixed by the supervising conciliation commissioner, who, upon hearing, saw and heard the witnesses testify? In other words, may a District Court overrule the finding of fact—or value—by the conciliation commissioner, and substitute its own judgment for that of the commissioner and arbitrarily double the value? This is the face of the fact that there was a conflict of evidence and that the great weight of evidence sustained the value placed upon petitioner's farm by the commissioner.

2. Was the respondents' petition for review in the District Court sufficient when the review was asked on the sole ground "That said order of the Supervising Conciliation Commissioner dated June 16, 1942, errs in that the value so fixed is not the present fair and reasonable market value according to the evidence submitted at said hearing?" R. 91. In other words, *should not the petition for review have been dismissed for the reason that it failed to point out wherein the supervising conciliation commissioner's findings were contrary to the evidence or contrary to the great weight of evidence or that there was a miscarriage of justice?*

Kowalaky v. *American Employer's Ins. Co.* 90 F. (2d) 476;

Fordyce v. *Railway Companies et al.,* (C. C. A.) 145 F. 544.

In re. Casoudounceq, 46 Fed. Sup. 718.

Virginia Railway Company v. *Chambers,* 4th Circuit, 46 Fed. (2d) 20.

Decisions Below.

The opinion of the Circuit Court of Appeals dated February 16, 1944, appears at R. 107 to 111. The final judgment of that Court appears at R. 111.

The findings of facts and conclusions of law of the District Court below appear at R. 92 to 98. The order denying the motion of the bankrupt to dismiss the petition for review, and setting aside the valuation, as fixed by the supervising conciliation commissioner, by the District Court below, appear at R. 99 and 100.

Statement of Facts.

The petitioner is a farmer-debtor under Section 75 of the Bankruptcy Act. He owns a farm of approximately 400 acres in Wells County, North Dakota. The respondents are the holders of a first and second mortgage on petitioner's farm. Petitioner was adjudged a bankrupt under Section 75(s) on the 29th day of March, 1940. R. 7. The Wells County conciliation commissioner appointed appraisers who appraised the petitioner's farm lands at $2,000, which appraisal was filed with the conciliation commissioner on or about the 25th day of November, 1940. R. 7 and 8. No objection or exception was filed or appeal taken within four months or at any other time from this appraisal.

On March 19, 1942, petitioner, in accordance with the provisions of Section 75(s) (3) paid into the District Court below the sum of $2,000, the amount of the appraisal, and petitioned the court that the same be accepted in full settlement and discharge of respondents' mortgages. R. 8 and 9.

The Court below referred that petition not to the Wells County conciliation commissioner, but, to its supervising conciliation commissioner at Fargo, North Dakota. Whereupon the supervising conciliation commissioner gave notice of a hearing to be held on June 2, 1942, in the courthouse at

New Rockford, Eddy County, North Dakota. Eddy County adjoins Wells County where the real estate in question is located. R. 11 and 12.

At this hearing, the respondents produced three witnesses. A Mr. Larson, a so-called Federal appraiser of the Farm Credit Administration, but, in fact an employee of one of the respondents if not both. R. 13 to 25. A Mr. Giedt, Secretary and Treasurer of several national farm loan associations, which associations are the local representatives of the respondent, The Federal Land Bank. R. 25 to 41. And a Mr. Adams, a local real estate man at Fessenden, North Dakota. R. 41 to 46.

Respondents' witnesses differed as to the value of petitioner's farm. Mr. Larson, the so-called Federal appraiser, the employee of the respondents, placed it at $4,800. R. 24. Mr. Giedt, the Secretary and Treasurer of respondents' local associations, placed it at $5,000. R. 38. And Mr. Adams, the real estate man, placed it at $5,500. R. 42. The value under their testimony increased progressively as the testimony continued. Apparently, the court's own supervising conciliation commissioner was not greatly impressed with their testimony.

On the other hand, the witnesses for the petitioner consisted of himself and four disinterested witnesses. None were his employees and none were paid by him to testify. They were people who lived in the locality and should know the value of farm land. Of course, the petitioner was interested, but, no more so than the employed witnesses of the respondents. The fact that one of these other witnesses had also filed under the Frazier-Lemke Act gave him no direct interest in the question under consideration.

Petitioner testified that a similar farm of 560 acres, 160 acres more than his own, was appraised and sold for $2000. This farm was the next section east of petitioner's. R. 48. While the lower court, in its findings of fact, placed con-

siderable *stress* upon sales testified to by respondents' witnesses, R. 95, it *failed* to give the *same* emphasis to sales testified to by *petitioner's* witnesses. The court did point out that one sale testified to by one of petitioner's witnesses was 24 miles away, but, it overlooked the testimony of petitioner and the other witnesses of sales made for far less of similar farms nearby or adjoining sections of petitioner's farm. R. 49, 50 and 51.

Petitioner's witness, Erman, a farmer and director of the Wells County National Farm Loan Association, who is familiar with petitioner's farm, placed a value on it of $1600 to $2000. R. 60. He pointed out other sales of similar farms in the community for less than he valued petitioner's. R. 61. The lower court when it set aside the conciliation commissioner's findings *overlooked* these sales. But, they were undoubtedly considered by the commissioner.

Julius Moe, who operates farms in the vicinity of petitioner's, testified that petitioner's farm was worth $5 an acre or $2000. R. 68. He also testified to other sales and offers for sale in support of his valuation. R. 69 and 70.

The next witness for petitioner, was James Winstrom. While also proceeding under the Frazier-Lemke Act he has no interest in this case. He was not a paid witness nor a so-called Federal appraiser working for respondents. He placed the value of petitioner's property at $5 an acre or $2000. He also testified to sales of land, some of which his own son bought, at a price less than $5 an acre. R. 72, 73 and 74.

The last witness for petitioner was a Mr. Garland, a farmer who lives five miles from petitioner's farm. This witness valued petitioner's farm at $2000. R. 77.

All of the petitioner's witnesses were people who lived in the locality of the land in question. They knew the value

from their knowledge of the community and from experience. They were competent to testify. They were disinterested farmers and peculiarly qualified to testify as to value. *Schmidt* v. *Beiseker* 120 N. W. 35. They were not like respondents' witnesses—experts.

They were not the kind of witnesses who through the ages have been the butt end of jokes among the legal profession. They were not so-called Federal appraisers. They were not brought in at a distance of 60 to 70 miles to value property they had seen once or twice. They were not in the employ of petitioner as were two of the witnesses of respondents.

From this record it is clear that there was conflicting testimony—testimony that had to be weighed and balanced. That it was the duty of the supervising conciliation commissioner, who heard the witnesses, saw them on the stand, noticed their demeanor and attitude while testifying, to weigh and balance the weight of their testimony and to determine the value. The supervising conciliation commissioner made that decision. He, after considering the testimony, valued the property at $2000. R. 88 to 90.

Thereafter, respondents petitioned the District Court for a review of the supervising conciliation commissioner's finding of value. R. 90 to 91. The only reason assigned for the review is set forth in paragraph 4 of respondents' petition. R. 91. It reads: "That said order of the Supervising Conciliation Commissioner dated June 16, 1942, errs in that the value so fixed is not the present fair and reasonable market value according to the evidence submitted at said hearing." May we submit that that is insufficient to warrant a review.

The District Court granted respondents' petition. It denied petitioner's motion to dismiss. It then set aside the supervising conciliation commissioner's finding of value

of $2,000 and fixed the value at $4,000. In other words, *it substituted its own judgment for that of its supervising conciliation commissioner, who saw the witnesses and heard them testify.* R. 92 to 98. The Circuit Court of Appeals of the Eighth Circuit affirmed the District Court.

Jurisdiction.

The jurisdiction of this court is sought to be invoked under the provisions of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347A). The petitioner complied with Section 8 (a) of the Act of February 13, 1925; 28 U. S. C. 350. The final judgment of the court below was entered on February 16, 1944.

Reasons Relied On for Allowance of Writ.

1. The decision of the Circuit Court of Appeals of the Eighth Circuit is in conflict with the Bankruptcy Act, 11 USC 203 (s) (3).

2. It is in conflict with the decision *In re Gustave Schafer Company* (CCA6) 163 Fed. (2) 137. It is in conflict with the decisions in *Equitable* v. *Carmody* (CCA8) 131 Fed. (2) 318; *Dunsdon* v. *Federal Land Bank* (CCA8) 137 Fed. (2) 84; *Burnett* v. *Central* (CCA8) 125 Fed. 836; *Rasmussen* v. *Greslay* (CCA8) 77 Fed. (2) 252; *Samuelson* v. *Central* (CCA8) 125 Fed. (2) 838 and *Fordyce* v. *Railway Companies, et al.* (CCA8) 145 Fed. 544 of its own Circuit. It is in conflict with the decisions *In re Stitzer Hotel Company*, 29 Fed. (2) 571 and *Kowalaky* v. *American Employers' Ins. Co.* 90 F. (2) 476.

3. The decision involves a question of great importance and public moment. It involves the proper interpretation and administration of a remedial act of Congress relating to the rehabilitation of farmer-debtors.

4. If the decision is allowed to stand it will continue to cause a multiplicity of conflicting decisions in the District Courts. It will produce uncertainty, confusion and prolonged needless litigation. It will not only defeat the rehabilitation of many farmer-debtors, but, will in effect annul the intent of Congress as expressed in Section 75 (s) (3) of the Bankruptcy Act.

5. A decision of this Court clarifying the above situation is highly desirable not only by farmer-debtors throughout the nation, but, by many courts and members of the legal profession. A farmer-debtor should know that, when he presents his evidence before the conciliation commissioner, the commissioner's decision is final, unless it is found to be clearly erroneous.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals, Eighth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the above entitled cause, being numbered 12,626 on its docket, to the end that this cause may be reviewed and determined by this Honorable Court, as provided for by Section 347A, Title 28, U. S. C. A.; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court; and for such further relief as this Court may deem proper.

Respectfully submitted,

WILLIAM LEMKE,
Fargo, North Dakota, home address,
Washington, D. C., office address,
Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Section 75.

In order to save the time of this court. we will make this brief short and concise. We shall briefly discuss Section 75(s) which gives to a farmer-debtor the benefit of the Bankruptcy Act. This Act was passed for the benefit and protection of the farmers of this nation. It provides an orderly manner of liquidating a farmer-debtor's indebtedness and giving him a new start in life. Obviously, that purpose cannot be accomplished if courts permit Federal agencies, the respondents, to continually harass the farmer-debtors with reviews and red tape and endless litigation. That purpose cannot be accomplished by arbitrary and unjust overvaluation.

The question before this court is the question of the method of determining "the fair and reasonable market value" of petitioner's farm. Congress provided the procedure. We quote from the first paragraph of 75(s) "The referee, * * * shall appoint appraisers * * *. Such appraisers shall appraise all of the property of the debtor, * * * at its then fair and reasonable market value. * * * Provided, That in proceedings under this section either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

Then, in order to protect both the farmer-debtor and his creditors from an *increase* or *decrease* in the value of the farm, Congress provided in paragraph 75(s)(3) that "At the end of three years, or prior thereto, the debtor may pay into court the *amount of the appraisal* of the property of

which he retains possession * * * less the amount paid on principal: Provided, That upon request * * * the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, *and after such hearing fix the value of the property,* in accordance with the evidence submitted, *and the debtor shall then pay the value so arrived at* into court less payments made on the principal * * *." The court will note that *there is no provision for review or appeal* from this reappraisal or revaluation. It is *final* unless fraudulent, mistaken, or contrary to the great weight of evidence.

If all the Federal Courts would only follow this procedure without prejudice or bias, if they would only realize that the insolvent farmer-debtor, under Section 75, has the same rights as insolvent corporations have under the Reorganization Section, then, there would be less litigation, and both the nation and the courts would be the gainers. Unfortunately, however, some of these courts persist in giving Section 75 a strict construction against the farmer-debtor.

These courts forget that Section 75 is a *remedial statute —that it must be liberally construed to accomplish its purpose.* They forget that farmer-debtors under Section 75 are financial wrecks. That Section 75 is a proceeding in bankruptcy—a proceeding to salvage and rehabilitate. It is no longer a question of profits and 100% returns. *It is a question of salvaging without unnecessarily wrecking homes.*

Decision of the Circuit Court Contradictory.

In the very first paragraph, the court says "that where a conciliation commissioner has held a 'hearing', pursuant to subsection s(3), and has fixed the value of the farmer-debtor's property, for redemption purposes, 'in accordance with the evidence submitted', the district judge, on petition

for review, *does not have the right to try the question of value de novo on the record, merely because he disagrees with the conciliation commissioner on the weight to which the conflicting, but substantial, competent and credible, evidence of the witnesses is entitled*" (R. 108). That is a correct statement of the law. General Orders 12, 47 and 50.

But, immediately after that, the Circuit Court goes out of its way to find some reason to sustain the District Judge's erroneous decision. A decision in which he erroneously set aside the conciliation commissioner's valuation of $2000, and raised it to $4000 in violation of Section 75(s)(3) and General Orders 47 and 50.

Again the Circuit Court says "In the appeal now before us, the farmer-debtor contends that the district judge ignored this principle, substituted his own judgment on witness-credibility for that of the conciliation commissioner, and unwarrantedly increased the redemption value of the farmer-debtor's land from the sum of $2,000, fixed by the commissioner, to the sum of $4,000, and that his order therefore should be reversed.

"*Some of the findings and conclusions of the district judge, in relation to the evidence, tend to support appellant's contention* and to approach the situation in Dunsdon *v.* Federal Land Bank of St. Paul (8 Cir.) 137 F. (2d) 84" (R. 108 and 109).

Then, the Circuit Court goes *beyond any issue raised by petitioner's assignments of error.* (R. 102 and 103). *It goes beyond any issue presented in brief or argument.* In fact, it ignores the District Judge's inaccurate findings of fact and conclusions of law (R. 92 to 98 inclusive). It finds a reason of its own somewhere in the record in order to sustain the District Judge's decision, which reason is far fetched and not warranted by anything in the record.

In its opinion the Circuit Court states "But a reading of the entire record indicates that there was a ground on which the proceedings and order of the conciliation commissioner were required to be held 'clearly erroneous', and the district judge was under the circumstances authorized to make a determination of the value of the land on a proper legal basis.

"The conciliation commissioner's order recited that the value of $2,000 fixed by him was arrived at, 'after considering the evidence as to values of said real property offered and received at said hearing, *and taking judicial cognizance of all the files and records in this case.*' (Emphasis added.) The appraisal report has been incorporated in the record here, as being one of the filings of which the conciliation commissioner purported to take judicial notice in reaching his decision. The value fixed by the commissioner was the identical figure of the appraisal report" (R. 109).

We submit that the Circuit Court put an unwarranted construction, and drew an unwarranted inference from the language used by the conciliation commissioner, which more fully quoted, reads, "*and after considering the evidence as to values of said real property offered and received at said hearing, and taking judicial cognizance of all the files and records in this case, now makes the following order fixing values of said real property in this proceeding, viz.,*"

Of course, the conciliation commissioner took judicial notice that he was presiding at a hearing in a bankruptcy proceeding under Section 75(s). He perhaps took judicial notice that $2000 had been deposited by petitioner to redeem. He perhaps took judicial notice also that $2000 was the amount of the appraisal. He would have been dumb indeed if he did not know that. There is nothing in the law that requires a conciliation commissioner's mind to become a blank.

But, there is *nothing* in the record that shows that he *attempted* to sustain the appraisal, or that he even *gave* it a *passing* consideration. He was there to observe the witnesses, receive their testimony and *consider* the evidence as to value of said real property offered and received at said hearing. That is in substance his own language. *Surely* the Circuit Court was *not justified* in entering the field of speculation to the extent that it attempts to in order to sustain an erroneous decisoin of the District Court —a court whose findings of fact and conclusions of law it not only refused to accept, but, ignored.

The court refers to the *Rait* vs. *Federal Land Bank of St. Paul* case, 135 F. (2d) 447. (R. 109). That case is not in point. In that case the conciliation commissioner said he knew of his own knowledge that the appraisal was too high. In other words, he was basing the value not upon evidence, nor even upon judicial notice, but, upon his own knowledge. There is nothing of that kind in the record of the instant case.

The Correct Rule.

The rule is that where a referee fixes value after personally hearing and observing witnesses who orally testified before him, a reviewing court will not retry the matter and reach an independent conclusion. It follows that the conciliation commissioner's valuation *cannot be disturbed* by the District Judge *unless* it is contrary to the great weight of evidence, or where there is fraud or a miscarriage of justice. *We call attention to the fact that Section 75(s) (3) does not authorize a review or appeal from the revaluation.* We repeat that the revaluation is final unless contrary to the great weight of evidence, or in case of fraud or a miscarriage of justice. General Orders 47 and 50.

Cases Supporting Petitioner.

In *Equitable* v. *Carmody,* (CCA 8), 131 Fed. (2d) 318, the court had before it a case remarkably similar to the one at bar. There the farmer-debtor tendered the appraised value of $110 per acre whereupon, as here, the mortgage holder asked for a revaluation. After a hearing the conciliation commissioner found the value to be $110 per acre. Five real estate salesmen testified for the mortgage holder that the land was worth $135 or $140 an acre. Five neighboring farmers on behalf of the farmer debtor testified it was worth $100 to $110.

Upon appeal the court in affirming the district court said:

"The question of market value in the present case was a pure fact issue, *which, as we have indicated above, the conciliation commissioner was entitled to determine,* not merely from the value estimates of the experts, but from an evaluation or appraisal of all the competent elements developed in the testimony of the opposing witnesses, *in the light of the common knowledge and experience of the community on such a general matter.* The evidence in the record is substantial and conflicting, on the part of witnesses generally qualified to testify as to the facts of the various value elements involved, and, in such a situation, where the question undoubtedly is of credibility, weight and judgment, the conciliation commissioner's finding as to value, in a proceeding of this nature, *should ordinarily be controlling.*" See also *Burnett* v. *Central,* (CCA 8), 125 Fed. 836 and *Newman* v. *Burnham,* 126 Fed. (2nd) 336.

In *Rasmussen* v. *Gresley,* (CCA 8), 77 Fed. (2d) 252, the court said "The determination of a referee in bankruptcy of issues of fact based upon the evidence of witnesses appearing in person before him, where such determination must rest upon the credibility of the witnesses and the

weight of their evidence, *should ordinarily be accepted upon review,* except in those cases where it is obvious that the referee has made a mistake. (Citing cases). A different rule would virtually make a review of the findings of a referee as to issues of fact *which depended for their correctness upon the credibility of witnesses who had personally appeared before him and upon the weight of their evidence, a trial de novo.*"

In *Dunsdon* v. *Federal,* 137 Fed. (2d) 84, the court states "In a proceeding of the character here involved, where there has been only a review of the previous record and no additional evidence has been received, *the law clearly does not contemplate that a finding of a conciliation commissioner shall be set aside by a district judge on a mere difference in personal judgment as to the crediting of the record evidence.*"

In *Federal Land Bank* v. *Castanien,* (CCA 6), 116 Fed. (2) 588, under Section 75(s) (3), upon motion of the mortgage holder, after hearing and with the consent of the farmer-debtor a conciliation commissioner terminated the stay and ordered liquidation. The mortgage holder filed a petition for review which the judge denied. The mortgage holder appealed, there being no opposition at any stage, and the appellate court affirmed, holding the conciliation commissioner's order was final. There is no controversy over this decision.

Pfister v. *Northern Illinois,* 317 U. S. 144, 63 S. Ct. 133; 87 L. Ed. 123. (1) The subject of valuation was not in issue. (2) It held that Section 75 provides for appeal only from the first appraisal, not the second. (3) It held that the original orders of the conciliation commissioner might not be interfered with. *The three aspects of the decision lend no countenance to a retrial or change of the fact question of value as found by the conciliation commissioner who heard all of the witnesses personally.*

The principle set forth in the above decisions is so well established by numerous decisions that a further citation of cases would simply be a waste of this court's time.

Respondents' Petition Insufficient.

It is well settled by numerous decisions that a petition for review must specifically set forth facts justifying a review. It must point out wherein the conciliation commissioner's findings were contrary to the evidence, or contrary to the great weight of evidence, or that there was fraud or a mistake, or that there was a miscarriage of justice.

In the case at bar the only reason for asking a review is in these words: "*That said order of the Supervising Conciliation Commissioner dated June 16, 1942, errs in that the value so fixed is not the present fair and reasonable market value according to the evidence submitted at said hearing.*" We submit that that is insufficient.

"It is settled law that exceptions to the Report of a Master *should point out specifically the errors* upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but that the Master may know in what particular his Report is objectionable and may have an opportunity to correct his errors or reconsider his opinions; and, also, because the main object of such a reference being to lighten the Court's labors, the Court should not be obliged to rehear the whole case on the evidence when the Report is made. * * *

"But, the District Judge should not disturb the findings of fact of a Referee in Bankruptcy, *unless there is most cogent evidence of mistake and miscarriage of justice.*" *Kowalaky* v. *American Employer's Ins. Co.* 90 F. (2d) 476.

"Exceptions to findings of fact by a master should not be to the general result, *but must be specific, and point*

out the particular errors relied on, and where they are based on particular evidence should refer to the place in the record where the same may be found." *Fordyce* v. *Railway Companies, et al.,* (C. C. A.) 145 F. 544. 6 Am. Juris. 566.

This matter has been before the bankrupt courts on several occasions and the Courts have held repeatedly that a Petition for Review is defective where the Specifications of Error are set forth in general terms only and do not show the reason why it is contended that alleged errors have been committed. You will find these propositions set forth in: In re. Casoudounceq, 46 Fed. Sup. 718. In re. Charles Stone Florsheim, Bankrupt, 24 Fed. Sup. 991.

Other courts have said that an assignment of error which merely contends that the verdict is wholly unsupported by the evidence is insufficient and "*presents nothing for consideration of an Appellate Court.*" *Hecht* v. *Alfaro,* 10 Fed. (2d) 464.

In *Virginia Railway Company* v. *Chambers,* 4th Circuit 46 Fed. (2d) 20, the court makes the statement that the court cannot undertake to sift the evidence and discover the error simply *because the plaintiff alleges error in general terms.*

In the same case the court points out that "where an assignment that a particular finding is not sustained by the evidence is made, without stating the substance of the evidence, and showing how it fails to support the findings, the assignment is insufficient."

Such assignments as "the evidence is insufficient to justify the verdict herein," or "the verdict is contrary to the instructions of the Court and against the law," or that "the Court erred in permitting the Judgment," *were all declared to be too general to be reviewed.* See also *In re. Humphrey's Gold Corporation* v. *Lewis,* 90 Fed. (2d) 896.

Conclusions of Law Biased.

We have stated that the Circuit Court paid no attention, and did not accept the conclusions of law of the lower court. In reading those conclusions, and the entire record, one cannot help but come to the conclusion that the district judge was unconsciously biased. *His conclusions of law are not only erroneous, but, they are inaccurate. Most of them have no foundation in fact or in anything in the record.*

In his conclusion No. 1, R. 97, the district judge says "The Order of the Supervising Conciliation Commissioner is clearly erroneous in entirely disregarding the testimony of well qualified witnesses, for whose testimony there is excellent foundation."

There is nothing in the record that would support such a conclusion. There is nothing in the testimony that would warrant it. There is nothing in the conciliation commissioner's findings that would support such a conclusion. Is it possible that the judge feels that the respondents' employed witnesses' testimony is beyond question, and that it is clearly erroneous for the conciliation commissioner to consider, weigh and balance it with the testimony of petitioner's witnesses?

Again in finding No. 2, R. 97 and 98, the district judge says: "The Order of the Supervising Conciliation Commissioner is clearly erroneous in disregarding such pertinent factors as actual bona fide sales in the neighborhood, qualified in time and distance; the assessed valuation of the land, the insurance obtainable upon the buildings, and the values admittedly placed thereon by its owner, the bankrupt herein, when purchasing the same, securing loans upon it, and both in a prior proceeding and in this proceeding."

Again we say there is nothing in the record that would warrant any such conclusions of law. There is nothing in

the conciliation commissioner's report that would warrant the statement that he "disregarded pertinent facts." There is nothing in the testimony that would support such a conclusion. However, the judge is in error. Assessed valuation is not a test of value, and is not considered even competent evidence in many courts and States. Insurance obtainable likewise is not admissible unless made so by state law, and the value placed upon it by the owner is admissible only if made within recent time and under similar conditions. It is not admissible after ten years of drought.

The question in this case is the valuation in a bankruptcy proceeding as determined under the procedure laid down by Section 75(s)(3). The question is what was "the then and present value?" It is not what somebody thought it was or what it was insured for or what it was purchased for or what the amount of the loan was. This is a case of bankruptcy and rehabilitation.

In finding No. 3 the District Judge makes the further surprising statement that "The Order of the Supervising Conciliation Commissioner is clearly erroneous wherein the same is based upon opinion testimony of witnesses not qualified to express opinion, which rested upon an inadequate foundation both as to the basis and extent of inspection and appraisal."

Again there is nothing in the record that would justify any such a conclusion, unless it be that the judge thinks it is improper for a farmer to testify to the value of his own property, or for his neighbor, living in the same or adjoining county and locality, to testify to the value of property they are familiar with. Courts universally have held that persons familiar with and living in the community, and engaged in the same business, are competent to testify, and that their testimony is superior to that of expert witnesses and appraisers who have seen the property only

nce or twice as was the case with respondents' witnesses, arson and Adams.

Conclusion.

In conclusion, petitioner feels that the decisions below all for the exercise of the supervision of this court. They onflict with the statute. They conflict with the decisions f other circuit courts and district courts. They conflict ith previous decisions of the same circuit.

Wherefore, in order to clarify and clear up confusion n the procedure and administration of a remedial statute, nd in order to lessen prolonged and needless litigation n the administration of justice, petitioner prays that this ourt issue a writ of certiorari to the appellate court.

Respectfully submitted,

WILLIAM LEMKE,
Fargo, North Dakota, home address,
Washoington, D. C., office address,
Counsel for Petitioner.

(17)

MAY 1 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 838

ARCH S. RHODES,

Petitioner,

vs.

THE FEDERAL LAND BANK OF ST. PAUL, A CORPORATION, AND FEDERAL FARM MORTGAGE CORPORATION, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT THE FEDERAL LAND BANK OF SAINT PAUL

ROBERT J. BARRY,
MICHAEL A. SCHMITT,
JOHN F. LORD,
Counsel for Respondent,
The Federal Land Bank of Saint Paul,
346 Jackson Street,
St. Paul, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX

	Page
Basis of Jurisdiction	1
Restatement of Issues	1
Reasons Why Writ of Certiorari Should Be Denied	2
Argument	3
1. Section 75(s)(3) of the Bankruptcy Act clearly provides that only such evidence as is submitted at a hearing to fix the value of property shall be considered in fixing the value thereof	3
2. The decision of the Circuit Court of Appeals herein does not conflict with the decision of any other Circuit Court of Appeals on the same matter; and it does not conflict with any applicable decision of the Supreme Court of the United States	4
3. The Circuit Court of Appeals has not decided herein an important question of Federal law which has not been settled by this Court	5
4. A conciliation commissioner's order fixing value under Section 75(s)(3) of the Bankruptcy Act is subject to review by the District Court. No error having been assigned as to the sufficiency of respondents' petition for review in either the District Court or on appeal to the Circuit Court of Appeals, its sufficiency is not now properly reviewable by this Court	7
Conclusion	8

INDEX TO AUTHORITIES CITED

CASES

Carter vs. Kubler, 320 U. S. 243	3, 4, 5
Equitable Life Assur. Soc. vs. Deutschle, 132 F. (2d) 525	3
General Talking Pictures Corp. vs. Western Electric Co., 304 U. S. 175	5
Kauk vs. Anderson, 137 F. (2d) 331	3
Moser vs. Mortgage Guarantee Co., 123 F. (2d) 423	3
Pfister vs. Northern Illinois Finance Corp., 317 U. S. 144	8
Rait vs. Federal Land Bank of St. Paul, 135 F. (2d) 447	7

RULES AND STATUTES

General Order in Bankruptcy 36, 11 U. S. C. following 53	4
General Order in Bankruptcy 47, 11 U. S. C. following 53	4
Rules of Civil Procedure 52	4
Section 39(c) of the Bankruptcy Act, 11 U. S. C. 67(c)	8
Section 75(s)(3) of the Bankruptcy Act, 11 U. S. C. 203(s)(3)	1, 2, 3, 7, 8
Section 240 of the Judicial Code, 28 U. S. C. 347	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 838

ARCH S. RHODES,

Petitioner,

vs.

THE FEDERAL LAND BANK OF ST. PAUL, A CORPORATION, AND FEDERAL FARM MORTGAGE CORPORATION, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT THE FEDERAL LAND BANK OF SAINT PAUL

BASIS OF JURISDICTION

This Court has jurisdiction under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

RESTATEMENT OF THE ISSUES

(a) Where a Conciliation Commissioner, in fixing value of property of a farmer-debtor after a hearing pursuant to Section 75 (s) (3) of the Bankruptcy Act (11 U. S. C. 203 (s) (3)), improperly considered evidence not submitted at such hearing, and upon petition by respondents for review of said order fixing value, the District Court found it

to be clearly erroneous and accordingly modified it, was the Circuit Court of Appeals correct in affirming the District Court on the ground that the value must be determined solely from the evidence adduced at the hearing, and that the use of evidence obtained in any other manner made the Commissioner's order clearly erroneous.

(b) Where the District Court, having found an order of a Conciliation Commissioner fixing value after a hearing pursuant to Section 75 (s) (3) of the Bankruptcy Act (11 U. S. C. 203 (s) (3)) to be clearly erroneous, proceeds to modify the order with respect to the value of the property upon the evidence before it, was the Circuit Court of Appeals correct in affirming the District Court on the ground there was ample supportive evidence.

REASONS WHY WRIT OF CERTIORARI SHOULD BE DENIED

1.

Section 75 (s) (3) of the Bankruptcy Act clearly provides that only such evidence as is submitted at a hearing to fix the value of property shall be considered in fixing the value thereof.

2.

The decision of the Circuit Court of Appeals herein does not conflict with the decision of any other Circuit Court of Appeals on the same matter; and it does not conflict with any applicable decision of the Supreme Court of the United States.

3.

The Circuit Court of Appeals has not decided herein an important question of Federal law which has not been settled by this Court.

4.

A Conciliation Commissioner's order fixing value under Section 75 (s) (3) of the Bankruptcy Act is subject to review by the District Court. No error having been assigned as to the sufficiency of respondents' petition for review in either the District Court or on appeal to the Circuit Court of Appeals, its sufficiency is not now properly reviewable by this Court.

ARGUMENT

1.

Section 75 (s) (3) of the Bankruptcy Act Clearly Provides That Only Such Evidence As Is Submitted At A Hearing To Fix the Value Of Property Shall Be Considered In Fixing the Value Thereof.

The decision of the Circuit Court of Appeals of which petitioner seeks review holds it clearly erroneous for a Conciliation Commissioner, in fixing the value of property after a hearing, pursuant to Section 75 (s) (3) of the Bankruptcy Act, to consider any evidence save that submitted at the hearing itself. The subsection is clear and concise:

> "The Court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, *and after such hearing, fix the value of the property, in accordance with the evidence submitted.* . . ." (Italics added.)

There is no uncertainty in the law as to the meaning of the above quoted provision. In *Carter vs. Kubler*, 320 U. S. 243, this Court stated that the valuation must be determined solely from the evidence adduced at the hearing. See, also, *Moser vs. Mortgage Guarantee Co.*, 9 Cir., 123 F. (2d) 423; *Equitable Life Assur. Soc. vs. Deutschle*, 8 Cir., 132 F. (2d) 525; *Kauk vs. Anderson*, 8 Cir., 137 F. (2d) 331.

The requirement that only such evidence shall be considered as is adduced at the hearing itself is in accord with the usual course of judicial proceedings. Each party is entitled to be present and to be apprised of all the evidence upon which a factual adjudication rests. Each party is entitled to an opportunity to examine, explain or rebut all such evidence. These are basic elements of a fair judicial hearing. *Carter vs. Kubler, supra.*

2.

The Decision Of the Circuit Court Of Appeals Herein Does Not Conflict With the Decision Of Any Other Circuit Court Of Appeals On the Same Matter; And It Does Not Conflict With Any Applicable Decision Of the Supreme Court Of the United States.

The applicable rule to be applied in a review of the referee's findings is clearly stated in General Order in Bankruptcy 47:

> "The judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report *or may modify it* or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." (Italics added.)

The applicable rule to be applied to findings of the District Court is clear. Under General Order 36 the Rules of Civil Procedure apply to bankruptcy proceedings. Rule 52 of the Rules of Civil Procedure provides:

> "Findings of fact shall not be set aside unless clearly erroneous."

Instead of any conflict with an applicable decision of this Court, the decision of the Circuit Court of Appeals herein is in accord with *Carter vs. Kubler*, 320 U. S. 243, wherein this Court said:

"Section 75 (s) (3) makes clear the impropriety of the conciliation commissioner's action. If the District Court conducts a hearing to determine the value of the property or if the conciliation commissioner is authorized to hold such a hearing, the statute provides that the valuation shall be fixed 'in accordance with the evidence submitted' at the hearing * * *. The valuation must thus be determined solely from the evidence adduced at the hearing and the use of evidence obtained in any other manner is improper. *Moser vs. Mtg. Guarantee Company, supra; Equitable Life Assurance Soc. vs. Deutschle* (C. C. A. 8), 132 F. (2d) 525, 52 Am. Bankr. Rep. (N. S.) 116. And the parties are entitled to a valuation based on a strict adherence to this orderly procedure."

The situation presented by the facts in the instant case is the same as in *Carter vs. Kubler, supra*, and the Circuit Court of Appeals cited and followed this Court's decision.

3.

The Circuit Court Of Appeals Has Not Decided Herein An Important Question Of Federal Law Which Has Not Been Settled By This Court.

The respondents submit that the important question of Federal law involved herein has been settled by this Court. The petitioner's petition and brief herein exhibit an attempt to have this Court, on a writ of certiorari, reconsider the facts. The major portion of petitioner's brief is devoted to argument on the relative qualifications of the witnesses, their interest in the proceedings, the weight to be accorded their testimony, and the relative consideration to be given sales of land in the vicinity of the petitioner's farm. Certiorari is not granted to review evidence. *General Talking Pictures Corporation vs. Western Electric Company*, 304 U. S. 175, 178:

> "There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co. vs. North Carolina Pub. Serv. Co.*, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164; *U. S. vs. Johnston*, 268 U. S. 220, 227, 69 L. Ed. 925, 926, 45 S. Ct. 496. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *U. S. vs. Chemical Foundation*, 272 U. S. 1, 14, 71 L. Ed. 131, 142, 47 S. Ct. 1; *U. S. vs. McGowan*, 290 U. S. 592, 78 L. Ed. 522, 54 S. Ct. 95; *Alabama Power Co. vs. Ickes*, 302 U. S. 464, 82 L. Ed. 374, 58 S. Ct. 300. There is evidence to support them."

The Circuit Court of Appeals concurred with the District Court in the instant case, and said (R. 110):

> "Since the proceedings and order of the conciliation commissioner were 'clearly erroneous' on the ground stated, the only remaining question is whether the value fixed by the district judge was proper on the evidence. On that point, there can be no sound question, so far as our right of review extends in the matter."

Respondents submit that not only is petitioner's vehement argument of the facts not a proper basis for granting certiorari, but much of it is unwarranted by the record.

4.

A Conciliation Commissioner's Order Fixing Value Under Section 75 (s) (3) of the Bankruptcy Act Is Subject To Review By the District Court. No Error Having Been Assigned As To the Sufficiency Of Respondents' Petition For Review In Either the District Court Or On Appeal To the Circuit Court Of Appeals, Its Sufficiency Is Not Now Properly Reviewable By This Court.

Petitioner's motion in the District Court to dismiss respondents' petition for review was solely upon the ground that the District Court was without jurisdiction to review an order of the Conciliation Commissioner fixing value of property after a hearing pursuant to Section 75 (s) (3) of the Bankruptcy Act. The motion was denied upon this ground (R. 99, 100).

The sufficiency of respondents' petition for review was not raised in petitioner's motion to dismiss in the District Court (R. 91, 92) nor in his Statement of Points on appeal to the Circuit Court (R. 102, 103).

Respondents submit that the sufficiency of the petition for review is not now properly reviewable by this Court.

The law is clear that an order of the Conciliation Commissioner fixing value of a farmer-debtor's property pursuant to a hearing under Section 75 (s) (3) is subject to review by the District Court. In *Rait vs. The Federal Land Bank of Saint Paul*, 8 Cir., 135 F. (2d) 447, the Court said:

> "We have previously assumed that the right to review an order of the conciliation commissioner approving a reappraisal, or fixing the value of the property after a hearing, has always existed under the general provisions of subsection c of section 39 of the Bankruptcy Act, 11 U. S. C. A. 67, sub. c. . . . If there has heretofore been any real question in the matter which we have failed to recognize, it has now been sufficiently settled, we believe, against appellant's contention, by the expres-

sions in *Pfister vs. Northern Illinois Finance Corporation*, 317 U. S. 144. . . . We accordingly hold that, in a proceeding under section 75, sub. s of the Bankruptcy Act, an order of the conciliation commissioner approving a reappraisal made of the farmer-debtor's property, or fixing the value of the property after a hearing, properly is subject to review by the district judge. . . ."

In *Pfister vs. Northern Illinois Finance Corp.*, 317 U. S. 144, this Court held that all proceedings subsequent to the initial appraisal under Section 75 (s) of the Bankruptcy Act are subject to review under Section 39 (c) of the Bankruptcy Act, the Court stating:

"It is obvious that this proviso couched in terms of appeal, could not have been intended to control the review of the manifold activities of a commissioner engaged in handling an estate through three or more years of bankruptcy. To hold the proviso generally applicable would leave unregulated reviews of orders entered more than four months after the commissioner approves the appraisal. The section applicable to these reviews is §39 (c)."

Respondents submit that there appears no substantial reason or necessity for granting a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and prays the petition be denied.

Respectfully submitted,

ROBERT J. BARRY,
MICHAEL A. SCHMITT,
JOHN F. LORD,
Counsel for Respondent,
The Federal Land Bank of Saint Paul,
346 Jackson Street,
St. Paul, Minnesota.